that the sentence was both harsh and excessive. The use of motor-vehicles is a necessity in this day and age. I do not think any motorist should be exposed to the hazard of going to prison for long stretches unless he drives in a manner which evinces a truly culpable disregard for the safety of other road users.

The accused in this case had had a clean driving record since passing his driving test in 1961. Whether or not it was true, as the eye-witness said, that the accused reversed and ran over the legs of the woman after having knocked her down, was quite immaterial and irrelevant to the question of whether he was driving recklessly or dangerously prior to the accident. The medical evidence showed that the deceased suffered not even abrasions to her legs which would certainly have been observed on medical examination. had the wheels of the car passed over them. The allegation was thus refuted by independent, unimpeachable evidence. Even if the accused did reverse his car, so as to run over the woman' legs, what was done in panic, after the ghastly experience of knocking down the old woman, should not have aggravated his punishment.

But in revision I must also consider whether the accused was guilty of any offence, if the evidence failed to establish his guilt under section 34A. There was no doubt that the old woman did get into the way of the oncoming vehicle. In town driving the likelihood of pedestrians taking such risks should have been anticipated and greater care and attention displayed in driving. I think the accused should have been more alert. I would accordingly substitute and record a conviction under section 36(1) of the Road Traffic Ordinance and sentence him to imprisonment of such term as will set him free today.

Order accordingly.

RAJALACHMI v. SINNIAH

[A.C.J. (Raja Azlan Shah J.) June 23, 1973]

[Kuala Lumpur — Civil Appeal No. 4 of 1973]

Family Law — Maintenance — Wife living in adultery — Meaning of "living in adultery" — Proof of adultery — Whether children entitled to maintenance if wife living in adultery — Married Women and Children (Maintenance) Ordinance, 1950, s.5(2).

The appellant had applied for maintenance for herself and her three children. The learned magistrate dismissed her claim for maintenance but allowed a sum of $55 per month for the maintenance of the children. He held that the appellant was living in adultery and had refused to live with the husband without sufficient reason. The appellant appealed.

Held: (1) although the learned magistrate was wrong in holding that the standard of proof required to prove adultery was one on the balance of probabilities, on the facts it had been proved beyond reasonable doubt that the appellant was living in adultery;

(2) the wife's adultery did not however affect the court's discretion to make an order for maintenance of the children;

(3) in the circumstances of this case the sum ordered for maintenance should be increased to $30 per child.

Cases referred to:-

(1) *Pandari* v. *Parkash Rao* A.I.R. 1952 Hyd. 44.

(2) *Nand Lal Misra* v. *Kanhaiya Lal Misra* A.I.R. 1960 S.C. 882.

(3) *Haji Ahmad* v. *Sadah* [1954] M.L.J. 101.

(4) *Marimuthu* v. *Thirucitambalam* [1966] 1 M.L.J. 203.

(5) *Jatindra Nath Mohan Banerjee* v. *Gouri Bala Devi* A.I.R. 1925 Cal. 794.

(6) *Kista Pillai* v. *Amirthammal* A.I.R. 1938 Mad. 833.

(7) *Ma Thein* v. *Maung Mya Khin* A.I.R. 1937 Rang. 67.

CIVIL APPEAL.

Sri Ram (*Shaharuddin Abdul Aziz* and *Zaiton binte Puteh* with him) for the appellant.

E. Devadason for the respondent.

Raja Azlan Shah J.: This appeal raises once again the familiar question of the right and duty of the husband to maintain his wife under the provisions of the Married Women and Children (Maintenance) Ordinance, 1950. It is enacted in subsection (2) of section 5 of the Ordinance that a wife "living in adultery" forfeits her right to be maintained by her husband. The subsection consists of two limbs, to wit:

"No wife shall be entitled to receive an allowance from her husband under the provisions of this Ordinance, if she is living in adultery, or if, without sufficient reason, she refuses to live with her husband."

The appellant is the wife of the respondent. She married him according to Hindu rites in 1954. There are 7 children of the marriage, 4 are now living with the respondent while 3 are with the appellant. In her application for maintenance she has made several allegations of cruelty against the respondent, who in turn has raised counter allegations of adultery and leaving the matrimonial home without sufficient reason. At the conclusion of the case the learned magistrate dismissed her claim for maintenance but allowed a sum of $55 per month for the maintenance of the said 3 children in her custody in the following manner:

(1) Bhavani (age 4 years) — $25 p.m. maintenance

(2) Genarakaran (age 15 years) — $15 p.m. maintenance

(3) Rajeswari (age 16 years) — $15 p.m. maintenance.

I am of the opinion that the learned magistrate has properly exercised his discretion in awarding maintenance in favour of the 3 children because it is settled law that a wife's adultery does not affect the court's discretion to make an order for maintenance with respect to children. The appellant has now appealed against the whole of the decision of the learned magistrate.

There is evidence on record to show that the stress and strain of the marriage relationship appeared 3 years after marriage, resulting in the appellant constantly leaving the children and the matrimonial home when she found the moment propitious. The learned magistrate also found that some time in 1965 the appellant had indulged in extra marital relations with one E. Muniandy. He strongly relied on the uncorroborated testimony of the parties' daughter, aged 9 years, (RW1), who stated that

"in 1965 one E. Muniandy used to visit their home when the respondent was at work and that during those visits she and the other children were asked to leave the flat while he and the applicant stayed there for about an hour or so."

He concluded in these words:

"R.W.1 was about 9 years old then and I do not see any reason to doubt her testimony."

The appellant's constant absence from the matrimonial home had inflicted a traumatic wound upon the respondent's mind until it reached a stage beyond endurance. In 1966 she again left the matrimonial home for some 10 months. During this period he had taken another wife "to look after the children". In April 1968 the appellant finally left the matrimonial home. In January 1969 Dr. Lim Yew Inn of the Tanglin Hospital performed a D and C on her. According to the doctor she was 4 months pregnant and that she had an incomplete abortion. This vital aspect of the case was never challenged. It is common ground that from the time she left the matrimonial home until the abortion, marital intercourse did not take place between both spouses.

The learned magistrate directed his mind on the standard of proof with regard to adultery by saying and I quote in full:

"On considering the evidence adduced by the parties and counsel's submissions I was satisfied and on balance of probabilities that the applicant had committed adultery since leaving the respondent in April 1968. She denied having sexual intercourse with the respondent since leaving him but was found to be in the family way on 19.1.1969 — after about 8 months of being separated from the respondent. The only conclusion to be drawn from this fact was that she must have had sexual relations with somebody other than the respondent during the period April 1968 until 19.1.1969."

With regard to the second limb of the subsection the learned magistrate after reviewing the evidence said in a passage:

"On the foregoing reasons I find it difficult to believe that the applicant was forced to leave the matrimonial home by the respondent in April 1969. From the facts it was clear that the applicant, by her unwarranted behaviour, had been the cause of most of the family quarrels, and was used to leaving the matrimonial home on her own volition prior to 1968. From her past conduct the irresistible inference to be drawn was that she was not forced to leave the house by the respondent in April 1968. Pursuant to the second limb of section 5(2) of the Ordinance, supra, I therefore hold that the applicant is not entitled to receive any maintenance from the respondent."

The appeal is directed on four main grounds: (1) The learned magistrate misdirected himself as to the standard of proof of adultery in that he found on the balance of probabilities that the appellant had committed adultery when he ought to have considered that the appellant had committed adultery beyond reasonable doubt. (2) The learned magistrate erred in law and/or in fact in believing the uncorroborated testimony of R.W.1, a child of tender age, alternatively in failing to warn himself of the danger of believing such testimony in the absence of corroboration. (3) The learned magistrate erred in law and or in fact in holding that the appellant was not forced to leave the house by the respondent in April 1968 without sufficiently considering the appellant's grounds for refusing to return to the matrimonial home. (4) The learned magistrate erred in law and or in fact in awarding the monthly allowance of $55 in respect of the three children, which sum is grossly inadequate.

With regard to the standard of proof required to prove adultery, it is quite clear that here the learned magistrate was wrong in approaching the case on the balance of probabilities as is required in a civil case. It is not necessary to examine the authorities at any length; suffice it to say that the matrimonial offence of adultery must be proved beyond reasonable doubt.

It has been suggested that the uncorroborated testimony of a child of tender age should not be acted upon in a divorce suit. No doubt that is a prudent and proper general practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn. Even if there are no infirmities in such evidence it is desirable to seek corroboration of her evidence in view of her tender age. The respondent has given evidence that from investigations he discovered that the appellant had relations with one E. Muniandy in 1965 but such evidence, without something more, could not have sufficiently proved his case. The uncorroborated testimony of his daughter of tender age for reasons which later become clear, is of no assistance. In any event, nothing turns on this issue.

The words "living in adultery" in their ordinary and natural meaning are susceptible of only one meaning i.e., to a course of guilty conduct rather than to an isolated act of adultery or occasional lapses from virtue. That in my view seems to be exemplified and established in a number of judicial decisions under section 488(5) of the Indian Criminal Procedure Code, which is *in pari materia* to our section 5(2) of the Married Women and Children (Maintenance) Ordinance, 1950. The relief given under both the sections are essentially of a civil nature. See *Pandari* v. *Parkash Rao*,[1] *Nand Lal Misra* v. *Kanhaiya Lal Misra*,[2] *Haji Ahmad* v. *Sadah (f)*,[3] *Marimuthu* v. *Thiruchitambalam*.[4]

Thus in *Jatindra Nath Mohan Banerjee* v. *Gouri Bala Devi*[5] it was held that unless continuity of conduct is established it cannot be held from a single act of adultery that a woman is "living in adultery". In *Kista Pillai* v. *Amirthammal*[6] the court indicated that continued adulterous conduct is what is meant by "living in adultery". In *Ma Thein* v. *Maung Mya Khin*,[7] after stating that the phrase "living in adultery" refers to a course of guilty conduct and not to a single lapse from virtue, the court held that the fact that the child was begotten when the husband could not get access to her shows that the wife has been guilty of adultery on more than one occasion.

The question as it seems to me is whether a reasonable tribunal after properly directing its mind to the standard of proof required to prove adultery and applying it to the facts of the present case, is entitled in all the circumstances to draw the inference that the appellant was "living in adultery". When all these matters are considered together, I am far from saying that there was no material on which a court could properly infer, as it did infer that the appellant was living in adultery. In my judgment such an inference flows naturally from the facts. The fact that she was 4 months' pregnant after leaving the matrimonial home in April 1968 is clear indication that she must have been living in adultery with someone other than the respondent. Accordingly I would dismiss her appeal.

In view of my finding that it has been proved beyond reasonable doubt that the appellant was "living in adultery", it would be otiose to consider ground 3. If it is necessary to do so I would associate myself with the finding of the learned magistrate that she

refused to live with the husband without sufficient reason. In the absence of solid evidence, it strains credulity to suggest that the appellant who had no qualms in abandoning the children and the matrimonial home on a number of occasions, left the husband with sufficient reason.

I now come to ground 4, which is an appeal on quantum. The respondent is a draftsman attached to the City Hall, drawing a total salary of $802 and after various deductions his take home salary is between $320 and $350. With that amount he has to support his second wife, the 4 children and a younger brother. Speaking for myself, I very gravely doubt whether the sum of $55 is sufficient to maintain three growing-up children in this jet age. Times have changed; the cost of living has gone up. Bearing that in mind I would award a monthly sum of $30 in respect of each child, to take effect from 1 June 1971 and further order that this sum of $90 p.m. be attached from the respondent's salary.

Order accordingly.

SYED AZIZ BIN IBRAHIM v. HAYWARD

[F.C. — (Ong C.J., Suffian and Ali F.JJ.) July 3, 1973]
[Kuala Lumpur — Federal Court Civil Appeal No. 17 of 1973]

Practice and Procedure — Notice of Appeal served after date of filing but within the time limited for filing — Whether valid — Federal Court (Civil Appeals) (Transitional) Rules 1963, rr. 6 & 7.

In this case the appellant filed his notice of appeal on January 25, 1973 and the notice was served on the opposite party on the January 30, 1973. This date was within the time prescribed for filing the notice of appeal. A preliminary objection was raised that the notice of appeal was not served "at the time of filing the notice of appeal" as required by rule 7 of the Federal Court (Civil Appeals) (Transitional) Rules, 1963.

Held: it is sufficient if the notice of appeal is served within the time limited for filing the notice of appeal and as this was done in this case the preliminary objection must be dismissed.

Cases referred to:-

(1) *Monk* v. *Warbey* [1935] 1 K.B. 75, 81.
(2) *Tan Ting Kok* v. *Cheong Lep Keen* [1969] 1 M.L.J. 153.

FEDERAL COURT.

P. Devadas for the appellant.

S. G. Thakurta for the respondent.

Ong C.J. (read by **Suffian F.J.**): Judgment for damages in a running down case was delivered by the High Court in Malacca on January 10, 1973. The defendant appealed against part of the judgment by filing his notice of appeal on January 25. This was done within the period of one month as laid down by rule 13 of the Federal Court (Civil Appeals) (Transitional) Rules 1963. The notice was served on the opposite party affected on January 30. This date was still within the prescribed limit of one month for filing notice of appeal.

At the commencement of the hearing of this appeal counsel for the respondent raised a preliminary objection, based on rule 7 that "notice of appeal shall be served on all parties directly affected by the appeal or their solicitors respectively *at the time of filing the notice of appeal*". It was argued that the delay of 5 days in sending the notice was fatal.

This contention has only to be stated in plain language to reveal what a sad mistake it was. If it is right, a valid notice becomes invalidated if not served simultaneously with the filing of the notice. "At" could not mean "after" — even by a day or an hour, which makes the proposition absurd. This view clearly stems from the common error of picking out a solitary sentence from a judgment in a reported case and failing to read it in its own proper context: See *Monk* v. *Warbey*.(1) Counsel for the defendant relied on what was said in *Tan Ting Kok* v. *Cheong Lep Keen*(2) where there was an omission by the appellant to *serve* the notice of appeal within the period limited for *filing* the notice. I do not think it necessary to say any more, except that rule 7 was badly worded and that "at the time of" should have been better substituted by "within the time limited for filing". We therefore summarily dismissed the objection.

Suffian F.J.: We dismissed the respondent's preliminary objection and I now give my reasons.

The appellant lost his case in the High Court on 10th January, 1973. He wanted to appeal. He must not do so "after the expiration of one month from the date on which the judgment was pronounced", rule 13 of the Federal Court (Civil Appeals) (Transitional) Rules, 1963. Put positively, this means that he must do so before the expiration of one month after the date of the judgment. He had to take two steps:

(a) he had to give notice of appeal to the court, rule 6(1); and

(b) he had to serve a copy of that notice to the other side, rule 7.

First, he gave notice of appeal on 25th January, 1973. Secondly, he served a copy of the notice of appeal on the respondent; he did so however not on 25th but on 30th January, 1973: it will be observed that he did so before the expiration of one month after the date of the judgment.

Though the appellant served a copy of the notice of appeal on the respondent before the expiration of one month after the date of the judgment, the respondent raised a preliminary objection, arguing that the appeal was not properly brought before the court on the ground that the appellant should have served on the respondent a copy of the notice of appeal in the words of rule 7 "at the time of filing the notice of appeal", meaning on 25th January itself, not five days later, and for this argument the respondent relied on a judgment of the Federal Court delivered by me in *Tan Ting Kok* v. *Cheong Lep Keen and Another*.(2)

We rejected that argument, and it is desirable for me to explain *Tan Ting Kok*. The judgment in that case was not happily worded and has given rise to misunderstanding. That case did not mean to decide that the appellant must serve a copy of the notice of appeal on the respondent at the same time as he filed his notice of appeal. It is enough if he did so before the expiration of one month after the date of the judgment appealed against. What happened in *Tan Ting Kok* was that judgment was delivered on